No. 02-1687

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In The

Supreme Court of the United States

ROGER MILLER and RUTH MILLER,

Petitioners,

v.

LAWRENCE SILVER and SILVER & FIELD,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court agree to review an injunction issued by the District Court which prevented Ruth and Roger Miller from using misrepresentations and concealments to collaterally attack a class action settlement which they chose to accept and which the District Court then approved and entered as a judgment?

2. Should this Court grant review of the District Court's injunction when that injunction was essential in order for the District Court to manage its proceedings, vindicate its authority, and effectuate its decrees, as expressly set forth in this Court's decision in Kokkonen v. Guardian Life Insurance Company of America, 511 U.S. 375, 114 S.Ct. 1673 (1994), when the Millers did not challenge such authority below, and when there is no conflict in the circuits regarding the existence of such authority?

LIST OF PARTIES

The caption on the Fourth Circuit Opinion lists all of the parties to the original multi-district class action litigation. None of those parties has any interest in the present action; the parties affected by these proceedings are Ruth and Roger Miller, Lawrence Silver, and Silver & Field.

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OPINIONS BELOW

The Opinion of the Fourth Circuit appears under the name In Re American Honda Motor Company, Inc., Dealerships Relations Litigation, 315 F.3d 417 (2003). The Opinion of the District Court can be found under the same name at 162 F. Supp.2d 387 (2001).

STATEMENT OF THE CASE

The facts of this case are unusual, if not unique. To understand the context of the District Court's injunction it is helpful to have a basic understanding of the Honda bribery scandal and the class action settlements which resolved it ("MDL"). The District Court outlined the allegations of the bribery scandal in In Re American Honda, 941 F. Supp. 528 (1996). Silver & Field will describe below their representation of the Millers in that scandal and the settlement which the Millers attempted to collaterally attack.

The Petition omits a number of significant facts and misstates others. Silver & Field will correct those errors by reciting the facts in full and correcting any misstatements at the appropriate place in the narrative. Except as otherwise noted, the recitation will follow that of the District Court at Joint Appendix ["JA"] 1827-30. As a result of its extensive familiarity with the massive Honda bribery litigation over a period of four years, that Court was as thoroughly familiar with the facts as any court could ever be.

The Millers purchased Huntington Beach Honda from Ed Smith and Scott Robinson in mid-December 1986. As part of the purchase price, they paid $7 million for the "good will" of the dealership. A portion of the purchase price was to be paid over time, and the Millers personally guaranteed promissory notes given to the sellers. The Millers defaulted on the notes, and in March 1994, the widow of Ed Smith brought suit against them in the Superior Court of California for Orange County.

The Millers, who were not then represented by Silver & Field, filed a cross-complaint against Mrs. Smith and joined Mrs. Robinson, the widow of Scott Robinson, as a defendant on the cross-complaint. The cross-complaint raised, in very brief terms, some of the bribery issues which later became the focus of the MDL proceedings over which the District Court presided.

In July 1994, Silver & Field took over representation of the Millers. JA 579-80. On April 11, 1995, Silver & Field filed on the Millers' behalf a First Amended Cross-Complaint (JA 1196-1266) in the State Court proceeding. Silver & Field named American Honda as a defendant in the First Amended Cross-Complaint and asserted RICO and common law fraud claims arising out of the Honda bribery - scandal.[1]

The second claim is false as found by the District Court at JA 1830-1. Moreover, the Millers made materially inconsistent statements to the District Court about this issue. ***Compare*** counsel's argument that the basis for the arbitrator's award was not the alleged failure to comply with Shepherd, but the failure to bring the action in federal court (JA 1764:16-1765:16), ***with*** the completely inconsistent argument to the arbitrator at JA 1076-82 (a conflict noted by

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1 The Millers make two important misstatements at Petition p. 2 ["Pet. 2"]: (a) that Silver & Field brought their case in state court rather than in federal court as was done with other clients; and (b) that Silver & Field failed to plead a causal connection between the bribery scheme and the Millers' injuries (such pleading being arguably essential pursuant to the decision in Shepherd v. American Honda, 822 F. Supp. 625 (N.D. Cal. 1993)).

The implicit first claim -- that Silver & Field treated the Millers differently than its other clients -- omits two critical facts. First, *the Millers' case was already in state court.* This was inescapable -- the Millers could not control the pleadings because they were defendants and *because predecessor counsel had already raised the bribery claims in defense.* Second, the point is irrelevant because the Honda case was ultimately resolved as a class action; it made no difference whatsoever whether the Millers were in state court or federal court. And see JA 1829-30, n. 3.

the District Court at JA 1829-30 n. 3); and also *compare* counsel's assertion that Silver & Field first raised the Shepherd issue and the Millers only responded to it (JA 1765:13-16 and 1766:18-24) *with* the completely inconsistent claim – **in the same hearing** – that the Millers had pleaded the Shepherd issue in their malpractice complaint (JA 1817:1-17).

Honda filed a demurrer to the RICO claim in the First Amended Cross-Complaint on the ground that the Millers had failed to plead legally sufficient RICO damages. On November 9, 1995, Judge Tully Seymour, to whom the case was assigned, sustained the demurrer without leave to amend but "without prejudice to the cross-complainants filing a motion to reconsider the court's decision denying leave to amend . . .."[2]

In accordance with this order, Silver & Field filed a motion for reconsideration. Judge Seymour denied the motion and reaffirmed his original order.

The relationship between the Millers and Silver & Field deteriorated, and after the Millers threatened to assert claims for malpractice against Silver & Field, the firm withdrew its appearance. Thereafter, against Silver & Field's advice, the Millers voluntarily dismissed the claims they had filed in the California State Court action and re-filed them (JA 642-793) in the United States District Court for the Central District of California. The case was transferred to the District Court as part of the MDL. The Millers were represented in the MDL by the firm of Duane, Morris & Heckscher ("Duane, Morris"). Duane, Morris represented several other plaintiffs as well, and members of the firm served on the Plaintiffs' Executive Committee in the MDL.

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[2] The Millers' discussion of the status of the state law claims (Pet. 2 n. 1) is accurate, but omits relevant subsequent events. See JA 632 n. 11 and accompanying text.

In September 1997, Honda filed a motion to dismiss the Millers' MDL Complaint on the ground that the voluntary dismissal of the California action after the sustaining of a demurrer constituted a dismissal with prejudice. JA 154-96. The Millers argued in opposition that Judge Seymour's ruling was not a final order, so dismissal could not convert it into one. JA 223:6-15; 237:16-23. At a telephone hearing in early July 1998, the District Court indicated that it was inclined to refer the issue to California courts to determine the effect of the dismissal. However, the intervening MDL settlement, which the Millers accepted, made it unnecessary for the court to issue a ruling.

The first Honda settlement was negotiated between Honda and class plaintiffs in approximately mid-July 1998. The Millers' assertion (Pet. 3) that this settlement "did not encompass claims for legal malpractice" is irrelevant in the only sense in which it is true, and untrue in the only sense in which it is relevant. The exact terms of the settlement are essential to understanding the District Court's injunction and are described below.

The Settlement Agreement defined two types of claims, namely "Allocation Claims" and "Non-Allocation Claims". The Settlement Agreement created two different funds for these respective claims, the settlement fund and the reserve fund. The settlement fund compensated class members for their Allocation Claims pursuant to the plan of distribution. An Allocation Claim was defined as "any claim, allegation or assertion arising in any way from the allocation or distribution of Honda automobiles . . .." JA 497; 499; 502-6.

Class members, including the Millers, were notified of the settlement in the Notice of Class Action Settlement (JA 539). That Notice generally described the terms of the settlement, including the right to opt out and the plan of distribution. Paragraph 14 (JA 543) advised that "if you

remain in the class . . . you will be bound by the settlement agreement and any approval orders entered by the court."

Under the terms of the Settlement Agreement, Honda agreed to pay $329.8 million to those dealers who accepted the Settlement Agreement. The funds were to be distributed to the individual dealers according to a formula developed by class counsel. Pursuant to that formula, the Millers were to receive $6.32 million in the settlement.

In fact, the amount the Millers were told they were to receive was a mistake. It was $1 million too high under the plan of distribution formula that was used in determining the amounts to be paid to settling class members. The formula contemplated that each dealer would be paid $4,000 for each car which, as estimated by a regression analysis, the dealer had not received because of the bribery scheme. Some dealers, like the Millers, purchased their dealership during the class period, and were entitled to compensation only for those cars that were apportioned under the settlement formula to the dealership after the date of their purchase. This apportionment ordinarily was easy to accomplish because – apparently in all cases other than the Millers – Honda assigned a new dealer number when the dealership changed hands. The Millers, however, were given the same dealer number as their predecessors, and therefore received an apportionment of all of the cars to which their dealership was entitled in 1986 despite the fact that they did not purchase the dealership until mid-December of that year. This resulted in a misapportionment to them of 250 cars, which in turn resulted in an excess recovery of $1 million.[3]

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[3] A subsequent action against Honda resulted in additional recovery to class members. The Millers' share of that settlement (a total of $890,488) was approximately 14.09% of the inflated amount they received in the first settlement. See, e.g., JA 965 (exact amount not then known). The Millers therefore received an excess of $1,140,900 at the expense of other class members.

The Millers assert that this recovery, excessive though it was failed to compensate them for supposed additional damages they suffered in purchasing their dealership from a bribe paying dealer. However, shortly before the deadline to accept or reject the Honda settlement, the Millers received a letter from their counsel, Duane, Morris, advising them to accept the class settlement and the money they were to receive under the allocation formula. JA 1582:6-12; 1290-1300. That letter made two points relevant to their claims:

1. The Millers were particularly interested in recovering damages for their overpayment for the good will of the dealership ("blue sky damages"). Duane, Morris explained the problems with this demand:

> "As we explained, the 'overpayment of blue sky' damages are already, to a significant degree, factored into the allocation damage calculation because the amount of blue sky paid for a dealership is directly related to the dealership's annual profits which, in turn, directly relate to the number of cars received and sold. Nevertheless, . . . Neil Demchick [the Millers' expert witness in the MDL] analyzed the "overpayments" for Huntington Beach Honda as a separate damage element in the state court litigation between you and the Smiths, and concluded that the overpayment for Huntington Beach Honda totaled $2.3 million. This brings your present value total damage amount . . . – including an overpayment adjustment – to approximately $6 million for Huntington Beach **[i.e., less than the $6.32 million they were to receive in the class settlement]** . . ..

> "However, as we have discussed at length, there is significant risk that the damages you claim for the overpayment of blue sky for Huntington Beach Honda would be ruled by a court to be unrecoverable because they are not *proximately caused* by American Honda. We have discussed with you this concept of proximate cause at length, because it is our considered legal opinion that while these overpayment damages may have properly been recoverable from the Smiths and/or the Robinsons, it is unlikely that a court would find that Honda was liable for these damages." JA 1293. The District Court elaborated on these points at JA 1832.

2. The Millers' counsel told them that they were getting extra damages as a result, apparently, of an error by class counsel:

> "Finally, as we explained, we were additionally able to parlay to our benefit the fact that you purchased the stock, rather than only the assets, from S&R. In particular, it was not entirely clear to the class attorneys at what point you took over the dealership from Smith & Robinson. We did not expand upon this with them. However, it is safe to say that if the class attorneys looked into this in depth, they would realize that they allocated you an extra year of cars to which you would otherwise not be entitled. We believe that without our good relationship with the class attorneys, we would not have been able to squeeze this extra year of damages out of them. Nevertheless, you would not be able to justify this extra year if this case went to trial. This extra year in damages gives you

roughly another 400 cars, or $1.6 million." JA 1295. See also JA 1603-5; 1739-41; 1749-51; 1795-6.[4]

The Millers decided to accept the class settlement. When they did so, they petitioned the District Court for a delay of 60 days in the settlement on the ground that there was purportedly "no disclosure to class members of class counsel's, experts and litigation costs and petition for fees" [sic]. They also asked the Court "to limit all contingency fees sought from class members and request class members be only charged reasonable hourly fees in order to preclude excessive, exorbitant and improbable fees." JA 794; 976. Their petition was denied.

The Millers did not, however, disclose to the District Court their view that the Honda settlement was unfair, inadequate, and unreasonable because it did not compensate them and similarly situated class members for their blue sky damages. Nor did the Millers reveal that they were reserving their right to pursue such a claim against their former attorney. JA 1834. Instead they accepted the settlement, and accepted the findings contained in the Approval Order that "**the methodology proposed by the settling parties constitutes a fair and reasonable estimate of the damages suffered by the plaintiff class as a result of the alleged wrongful conduct of the defendants.**" Id. and JA 547.

Nor did the Millers contest the finding of the District Court "that the distribution plan is fair and reasonable and should be implemented." Id. Nor did the Millers contest the finding by the District Court that "the methodology

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[4] Later investigation, described in the record citations mentioned, showed that the extra year only resulted in an extra 250 cars/$1 million. The Millers denied to the District Court and to the Fourth Circuit that they received the excess payment, but do not persist in this denial in their Petition.

developed by [class experts] has adequately demonstrated that the class representatives and litigating dealers sustained injury common to the class as a whole and that the impact of that injury on each class member can be accurately estimated by the economic model that forms the basis of the proposed settlement." Id. and JA 549.

On October 9, 1998, the District Court entered the Approval Order. In that Order, the District Court found "the Settlement Agreement to be fair, adequate and reasonable, and in the best interests of the plaintiff settlement class as a whole . . .." JA 550:15-16. It further found that "the distribution plan as presented to the Court is fair and reasonable, is in the best interests of the plaintiff settlement class and shall be implemented consistent with the terms of the Settlement Agreement." JA 550:17-19. The Court also found "that the proposed settlement will provide a recovery to members of the plaintiff class in an amount that is a fair estimate of the damages suffered as a result of defendants' alleged conduct." JA 548:18-20.

The Settlement Agreement provided that the District Court would retain jurisdiction over the settlement. The Approval Order states that "this Court shall have and retain **exclusive** jurisdiction with respect to (i) implementation, interpretation and enforcement of the Settlement Agreement; (ii) supervision, allocation and distribution of settlement funds; and (iii) any applications or disputes concerning attorneys fees, costs and expenses which may arise." JA 550:27-551:3, emphasis added.

On January 20, 1999, Silver & Field filed a lien against the settlement proceeds due to be distributed to the Millers. JA 551A. The lien was based upon a claim of compensation for work Silver & Field had performed for the Millers, including a quantum meruit claim for a portion of the Millers' recovery in the MDL Settlement. JA 1606-7.

The Millers moved to strike the notice of lien on the ground that the District Court lacked jurisdiction. JA 558-73. Silver & Field opposed the motion to strike and requested that the District Court exercise jurisdiction over the entire dispute between themselves and the Millers. JA 605-35. The Millers assert (Pet. 4) that Silver & Field did **not** request that the District Court take jurisdiction over the Millers' claims. The District Court -- which certainly knew -- expressly held to the contrary: "Silver requested that I adjudicate the merits of both his fee claim and the claim for malpractice that the Millers were asserting against him." JA 1829.

In opposing Silver & Field's request, the Millers misrepresented that issues of state law would predominate in resolution of the dispute. They did not disclose that they would be asserting in the state proceedings a legal malpractice theory that would require an intimate knowledge of the legal issues involved in the Honda MDL proceedings. They also did not reveal that one of the contentions they intended to make in the arbitration proceeding was that the blue sky damages they were seeking were distinct from the allocation damages they had recovered in the MDL settlement. Resolution of that issue involved interpretation of the Settlement Agreement and, as the Millers knew, the Settlement Agreement conferred exclusive jurisdiction upon the District Court to interpret its terms. JA 1834.

By Order dated April 22, 1999 (JA 911-17), the District Court declined to exercise jurisdiction to adjudicate the dispute between the Millers and Silver & Field, finding, based upon what the Millers represented, that California state law would predominate in the resolution of that dispute. JA 1829. The District Court's statements at JA 916, esp. 2, clearly demonstrate that it understood that Silver & Field requested it to exercise jurisdiction over the entire dispute.

While the motion proceedings regarding the lien were pending before the District Court, the Millers filed a malpractice action against Silver & Field in the Superior Court of California. JA 865-87. After the District Court declined to exercise jurisdiction, Silver & Field moved to refer the claim to arbitration, and the California Superior Court so ordered.

The arbitration took place over 15 days between October and December, 2000. The Millers assert (Pet. 5) that Silver & Field did not attempt to preclude the Millers from making their arguments in the arbitration. This is just as incorrect as the claim that the firm did not ask the District Court to adjudicate the claims -- Silver & Field made three such attempts. JA 970; 1542:21-23.

The arbitrator, without issuing a written or oral decision, ruled in favor of the Millers in most respects, denying Silver & Field's claim for fees, and awarding the Millers $7,475,000 in "blue sky" damages to compensate them for the amount he found they had overpaid for the goodwill of their dealership and for which they allegedly did not receive compensation in the class settlement. JA 978-81.[5] The arbitrator did not make any award to the Millers for "allocation damages", because he was persuaded that the Millers had received fair compensation for such damages in the MDL proceedings. JA 979:20-25. The

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5 The Millers make a peculiar claim about Mr. Field's testimony in the arbitration. They assert (Pet. 5, n. 3) that he admitted that dealers who purchased from bribe-paying dealers received no extra consideration in the class settlement. They appear to imply an admission to this effect. The case, however, was a class action. Mr. Field was neither a party to the settlement nor class action counsel. He could not make admissions regarding the terms of the Settlement Agreement. In any case, the pages of the record (JA 1717-18) do not support the Millers' assertion. What Mr. Field said was that purchasing from a bribing dealer would not, *as a matter of fact*, increase a plaintiff's damages. JA 1717:11-25. The District Court made the same point at JA 1832.

arbitrator subsequently entered a supplemental award granting the Millers attorneys fees and costs in the amount of $871,474.96.

On February 1, 2001, fifteen days after the arbitration award, but before the supplemental award of attorney fees, Silver & Field returned to the District Court and sought (JA 960-77) enforcement of the Settlement Agreement and reconsideration of the April 22, 1999, order declining to exercise jurisdiction over the dispute. The Millers filed opposition, JA 1434-49, and Silver & Field submitted a reply, JA 1520-6.

At the end of the hearing on March 1, 2001, the District Court allowed the arbitrator to decide the attorneys fees issue, but expressly stated that it would enjoin any attempt to "place that arbitration award into a position where it would be recorded or executed . . .." JA 1591:22-1592:12. The Court also permitted the parties to file additional briefing, which they did.

The District Court issued its Opinion and Order dated August 24, 2001. JA 1826-35. That Order granted Silver & Field's request for reconsideration, enjoined the Millers from attempting to collect the blue sky damages they were awarded in the arbitration, and allowed them to collect attorneys fees to the extent that those fees were not incurred in attempting to obtain the blue sky damages award. The District Court declined to exercise jurisdiction over other aspects of the dispute.

The Millers appealed this Order, JA 1836, and Silver & Field cross-appealed, JA 1838. The Fourth Circuit affirmed, holding that the District Court used its injunctive power "to protect its exclusive jurisdiction to resolve interpretive questions under the MDL Settlement Agreement" and "to rectify the injustice . . . the Millers had perpetrated by engaging in misconduct in order to defeat such jurisdiction."

SUMMARY OF ARGUMENT

The Petition assumes a false premise: that Silver & Field collaterally attacked an arbitration award. There was a collateral attack in this case, but the Millers were the ones making it (and using misrepresentation and concealment to do so). The District Court properly enjoined them from doing so.

Since the injunction below **prevents** a collateral attack, rather than approving one, the various policy arguments advanced by the Millers serve only to undercut their own case. The District Court did not exceed its jurisdiction, it acted in accord with this Court's express statement approving jurisdiction in such cases. The District Court did not infringe on state law, it prevented an infringement on its own jurisdiction. There is no conflict in the circuits; the only other appellate court to face a similar issue reached the same conclusion.

ARGUMENT

A. The District Court Had Exclusive Jurisdiction To Enforce The Class Action Settlement.

The Fourth Circuit recognized that the All Writs Act does not provide an independent basis for federal jurisdiction. It understood that the District Court's jurisdiction existed as a result of the MDL:

> "The district court's possession of subject matter jurisdiction over the claims of the Plaintiffs' Class in the MDL Proceedings is not in dispute. Neither is it disputed that, pursuant to the district court's Settlement Approval Order, the district court retained exclusive jurisdiction to interpret the terms of the MDL Settlement Agreement should any dispute over its meaning arise." Pet. A, 34a-35a, footnote omitted.

The Fourth Circuit was indisputably correct in these conclusions. The Millers never challenged – nor could they – the District Court's jurisdiction over the MDL or the class action which was certified as part of the MDL proceedings. Nowhere did the Millers ever deny that they were members of the class who accepted the class settlement. The jurisdiction of the District Court over the Millers personally, over the settlement funds, and over the finality of the settlement itself is beyond dispute. That jurisdiction arose directly out of the Millers' own MDL complaint asserting federal question jurisdiction (JA 642-793), which became vested in the District Court as a result of the transfer order of the MDL panel pursuant to 28 U.S.C. §1407, and is an essential prerequisite to any rights the Millers claim as a result of the District Court's Orders pursuant to F.R.C.P. 23.

The Fourth Circuit also understood that the Millers were attacking the MDL Settlement:

> "The record in this case leaves no doubt that one of the key issues before the arbitrator was whether the MDL Settlement Agreement compensated the Millers for the inflated portion of the purchase price of their dealership attributable to the misallocation of Honda automobiles *prior* to their purchase of such dealership.
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> * * *
>
> Whether the Millers had already received full or partial compensation for the inflated portion of the purchase price of their dealership attributable to the misallocation of Honda automobiles *prior* to their purchase of such dealership undeniably raised in interpretive question under the MDL Settlement Agreement. Specifically, the Millers' argument regarding 'blue sky

> damages' versus 'allocation damages' raised an interpretive question regarding what damages the Millers received for their 'allocation claims' under the MDL Settlement Agreement. However, in flagrant disregard of the district court's exclusive jurisdiction to resolve such interpretative question, the Millers argued before the arbitrator that they were not compensated under the MDL Settlement Agreement for what they terms 'blue sky damages.'" Pet. A, 35a.

Again, the Fourth Circuit's conclusion can hardly be doubted. The Settlement Agreement (JA 494-538) -- to which the Millers were bound when they elected to remain in the class -- confirms the District Court's jurisdiction:

> "15.1 This Agreement is subject to, and the class certification is conditional upon entry by the Court following the Fairness Hearings(s) pursuant to Rule 23(e), of one or more order(s) and Judgment(s) [the 'Settlement Approval Order(s)']:
>
> * * *
>
> (f) Forever barring and enjoining the commencement of or maintenance by any Settling Class Member of any action, suit, or proceeding upon any Settled Claim . . ..
>
> * * *
>
> (i) Providing that this Court shall have and retain **exclusive** jurisdiction with respect to (i) implementation, interpretation, and enforcement of the settlement, and (ii) applications for attorneys' fees, costs, and expenses.
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> * * *

19. CONTINUING JURISDICTION OF THE COURT

19.1 **This Court shall maintain and administer this Agreement and shall have exclusive and continuing jurisdiction, control and supervision of the Agreement and the Settlement Fund.**

19.2 **The Court shall have exclusive and continuing jurisdiction and control over any and all disputes arising from or relating to this Agreement, including but not limited to disputes concerning the interpretation of the Agreement and its terms, the Plan of Distribution, attorneys' fees, and/or the validity or timeliness of requests to opt out of the Settlement Class, ...**

19.3 **Any dispute under or relating to this Agreement shall be submitted to this Court.** In the event any dispute is submitted to the Court, each party concerned shall be entitled to twenty (20) days written notice (or otherwise, as the Court may for good cause direct), and the opportunity to submit evidence and to be heard on oral argument as the Court may direct. To the extent that additional or different procedures for dispute resolution are provided pursuant to any other provision of this Agreement, such other provision shall control. The prevailing parties to a dispute under this provision shall be entitled to its reasonable attorney's fees." (Emphasis added.)

The Approval Order confirmed this continuing jurisdiction: "[T]his Court shall have and retain exclusive jurisdiction with respect to (i) implementation,

interpretation and enforcement of the Settlement Agreement; (ii) supervision, allocation and distribution of the settlement fund; and (iii) any applications or disputes concerning attorneys' fees, costs, and expenses which may arise." JA 550:27-551:3.

Thus, under the specific terms of an agreement to which the Millers are parties, confirmed by the Approval Order, the District Court had not just jurisdiction, but exclusive jurisdiction over the MDL settlement and the distribution of the settlement funds, including claims to attorneys fees.

This Court expressly recognized the propriety of such jurisdiction in Kokkonen v. Guardian Life Insurance Company of America, 511 U.S. 375, 381, 114 S.Ct. 1673, 1677 (1994):

> "The situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal -- either by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist."

Such jurisdiction is particularly important in class actions -- multiple, inconsistent proceedings can only be avoided if the supervising court retains control. The MDL settlement involved roughly 1800 class members located in every state in the Union. Piecemeal adjudication of disputes would have resulted in utter chaos.

The exclusive jurisdiction of the District Court over the settlement preceded the settlement as a matter of law, is essential to the implementation of orders issued pursuant to F.R.C.P. 23, is expressly granted by the Settlement Agreement to which the Millers are bound and under which they seek recovery, and is essential to protect the integrity of the MDL settlement. No credible challenge to that jurisdiction has been or could be made.

B. Silver & Field Made No Collateral Attack.

The facts of this case plainly show that it is the Millers who collaterally attacked the Approval Order by attempting to re-litigate the issue of damages before the arbitrator. Every argument they make, every case they cite, condemns their own Petition.

Nor is there any meaningful sense in which Silver & Field engaged in a collateral attack. Silver & Field first invoked the District Court's jurisdiction in April 1999, six months **before** the case was ordered to arbitration, and 18 months before the arbitration began. It hardly needs saying that Silver & Field could not "collaterally attack" a proceeding which had not yet taken place. The District Court ruled against Silver & Field in April 1999, but the August 24, 2001, Order granted reconsideration of the April 22, 1999, Order (JA 911-917). JA 1835. The grant of reconsideration means that the circumstances must be evaluated as of April 1999, not today.

Even if the matter were considered today, the Millers' own misconduct vitiates any argument that Silver & Field have made a collateral attack. The District Court ruled as it did in April 1999 because the Millers misrepresented the facts to it. JA 1834. They may not now attempt to benefit from those misrepresentations by denying the jurisdiction of the District Court to decide these issues.

Even on its own terms, the Millers' collateral attack argument fails. In the first place, California law -- and it is California law which must determine the preclusive effect of decisions made pursuant to that law -- recognizes that the doctrines of collateral estoppel and res judicata are inapplicable when a judgment is void for lack of subject matter jurisdiction:

> "Obviously a judgment, though final and on the merits, has no binding force and is subject to collateral attack if it is wholly void for lack of jurisdiction of the subject matter or person, and perhaps for excess of jurisdiction, or where it is obtained by extrinsic fraud." 7 Witkin, California Procedure, 4th Ed., §286, p. 828.

In Rochin v. Pat Johnson Manufacturing Company, 67 Cal.App.4th 1228, 79 Cal.Rptr.2d 719 (1998), the Superior Court attempted to "correct" a judgment based upon a perceived judicial error. The Court of Appeal held that the Superior Court lacked subject matter jurisdiction to amend the judgment on that basis, 67 Cal.App.4th at 1238, 79 Cal.Rptr.2d at 725, and then stated that:

> "A judgment void on its face because rendered when the court lacked personal or subject matter jurisdiction or exceeded its jurisdiction in granting relief which the court had not power to grant, is subject to collateral attack at any time." Id. at 1239.

The other party contended that the failure to appeal from the amended judgment precluded the collateral attack. The Court of Appeal also rejected this argument, expressly stating that, "The doctrine of res judicata is inapplicable to void judgments." Id. It then quoted the language from Witkin cited above.

Given the void nature of the arbitration proceedings, the Millers' arguments about "principles of equity" make no sense. The question of having an adequate remedy at law hardly arises with respect to a decision rendered in the absence of subject matter jurisdiction. Since California law recognizes that such decisions are void, and subject to collateral attack, there is no basis for opposing an injunction against enforcement of such an award.

Here, the District Court retained its exclusive jurisdiction to resolve issues such as the interpretation of the Settlement Agreement. If the District Court's jurisdiction was exclusive – and exclusivity is crucial in class actions – the arbitrator had none. California law plainly recognizes that any "judgment" entered without subject matter jurisdiction, which the arbitrator attempted to do in this case, is void and subject to collateral attack.

C. **There Is No Conflict Between The Circuits.**

Since Silver & Field has not made any collateral attack, all the cases cited in the Petition are irrelevant. There is only one relevant case, and it reached the same result as the Fourth Circuit did here. There is no conflict in the circuits.

In Thomas v. Powell, 247 F.3d 260 (D.C. Cir. 2001), the appellant was one of the representative plaintiffs in a class action in the District Court for the District of Columbia alleging that the State Department discriminated against black foreign service officers. After six years of litigation, the parties signed a consent decree resolving the case and agreeing that the district court should certify the class and approve settlement pursuant to Rule 23. Thomas, along with other class members, objected to the settlement and hired separate counsel to oppose the settlement at the fairness hearings. Nevertheless, the district court approved the settlement and the Court of Appeal affirmed.

Thomas and other class members then sued class counsel for professional negligence in the Superior Court of the District of Columbia. Class counsel moved the district court for an injunction against that action, and the district court granted it under the All Writs Act. Thomas appealed, and the Court of Appeal affirmed.

Thomas argued on appeal that the Anti-Injunction Act barred the injunction. The Court of Appeal rejected this argument and found that the re-litigation exception to the Anti-Injunction applied to Thomas' Superior Court action. The Opinion by the Court of Appeal disposes of most of the arguments raised by the Millers:

> "The [re-litigation] exception rests on the idea that federal courts should not be forced to rely on state court application of *res judicata* or estoppel principles to protect federal court judges and decrees. Although the attorney-defendants in the Superior Court action case were not parties to the completed federal action, traditional preclusion principles may nonetheless bar Thomas and his co-plaintiffs from prosecuting that action against them. The doctrine of collateral estoppel, or as it is now commonly called 'issue preclusion,' provides that 'once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.' The re-litigation exception to the Anti-Injunction Act therefore permits federal courts to enjoin state court adjudication of those 'claims or issues . . . [that] . . . actually have been decided by the federal court.'" 247 F.3d at 262-3, citations omitted.

The Circuit Court then pointed out that the re-litigation exception applied even in those cases where some of the issues raised in the state court action had not been decided by the federal courts. "If the plaintiff still could not prevail because an essential element of his state cause of action had already been determined against him in the federal suit, the re-litigation exception would permit an injunction against the state proceedings." Id. at 263. Indeed, the re-litigation exception allows federal courts to enjoin state proceedings that raise a different cause of action, but still threaten the judgment in the federal proceeding. Id., citing United States v. District of Columbia, 654 F.2d 802, 809-10 (D.C. Cir. 1981).

Thomas' Superior Court complaint clearly infringed on the federal class action judgment. He asserted that class action counsel breached a duty of loyalty to Thomas, failed to disclose an alleged conflict of interest, and failed to follow Thomas' express instructions. Thomas claimed that because of these alleged breaches of duty, he lost his federal cause of action and the potential damages that might have derived from it. These allegations directly conflicted with the district court's findings when approving the class action settlement that the "settlement is fair, adequate, and reasonable" and that class counsel "fairly and adequately protected the interests of the class." Id. at 263-4.

The Court of Appeal also rejected Thomas' claim that the retainer agreement between Thomas and class action counsel imposed additional duties on the class action attorneys. This claim was part of a larger argument that the class action attorneys committed professional malpractice by having the class action certified under Rule 23(b)(2) rather than Rule 23(b)(3). That claim also required re-litigating an issue already decided in the federal courts, and was, accordingly, properly enjoined. Id. at 265.

There is one difference between the opinion in Thomas and the injunction issued below -- in Thomas, the attorneys whose actions were questioned were class counsel. That difference, however, could not provide any basis at all for distinguishing the result in Thomas. In Thomas, the fact that the attorneys were class counsel was relevant to the issue preclusion argument, since the district court's findings regarding class counsel's representation formed the basis for the collateral estoppel argument. Here, the District Court's findings regarding damages constitute the basis for application of collateral estoppel, and the fact that the attorneys were individually retained rather than class counsel is irrelevant.

The decision in Thomas leaves open just one issue for resolution: did the Millers attempt to re-litigate in the arbitration proceedings an issue already decided by the District Court? The District Court described the Millers' claims before the arbitrator at JA 1829-30:

> "According to the Millers, Judge Seymour had sustained Honda's demurrer in the litigation in the Superior Court for Orange County because Silver has misplead RICO damages by not claiming 'concrete financial loss' as required by the decision in *Shepherd v. American Honda Motor Co.*, 822 F. Supp. 625 (N.D. Cal. 1993). Further, according to the Millers, Silver knew how to plead damages properly because in the case of *Austin Motors v. American Honda*, which he filed on behalf of other clients . . ., I overruled the motion to dismiss filed by the Honda defendants on *Shepherd* grounds. The sustaining of the demurrer in the California case led to the Millers' decision to dismiss that action. That dismissal, in turn, led to the motion to dismiss the Millers' claims filed by Honda in

> this court. Honda's motion was still pending before me when the MDL settlement was reached, and the Millers assert that their fear that I would grant the motion lead to accept the settlement instead of opting out. Finally, they contend, that if they had opted out, they would have pursued their case against Honda and received both the allocation damages they received as part of the MDL settlement and the blue sky damages they allegedly suffered as a result of having overpaid for their dealership."

See also JA 965-6.

The Approval Order clearly precludes this claim by the Millers. Most importantly, the Millers' underlying claim for blue sky damages was an Allocation Claim as defined in the Settlement Agreement. JA 1831-2; 1613-15; 1624-9. The Approval Order expressly found that the recovery obtained by the class for the Allocation Claims was "fair, adequate and reasonable" (JA 550:15-16); that the distribution plan, under which the Millers obtained their share of recovery, was "fair and reasonable" (JA 550:17-19); and that the settlement provided a recovery to members of the plaintiff class "in an amount that is a fair estimate of the damages suffered as a result of defendants' alleged conduct" (JA 548:18-20). The Millers are barred from attempting to collect additional damages on this claim.

In the Approval Order, the District Court reserved to itself the **exclusive** jurisdiction to interpret and enforce the Settlement Agreement. JA 550:27-551:3. This was not a case which some other court might reasonably disagree with the District Court, this was a case in which the District Court was the *sole* and *exclusive* court which could decide the correct interpretation of the term Allocation Claim as used in the Settlement Agreement. Thus, the Millers' argument

to the arbitrator directly conflicted with the exercise of jurisdiction by the District Court and was subject to injunction.

The fact that the Millers knowingly took $1 million from other class members when they accepted the settlement gives added force to the District Court's exercise of **exclusive** jurisdiction. Only the District Court was in position to evaluate the totality of the Millers' conduct, including the fact that they were attempting to use the MDL proceedings over which the District Court presided to become a vehicle for the commission of a substantial injustice. JA 1834-5. The District Court properly issued its injunction.

CONCLUSION

For all of the reasons stated above, the Petition for Writ of Certiorari should be denied.

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